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May 5, 2009

## VIA ELECTRONIC FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch Secretary Federal Communications Commission 445 12<sup>th</sup> Street, S.W. Washington, D.C. 20554

Re: Petition For Declaratory Ruling Regarding AT&T's U-verse PEG Product, MB Docket No. 09-13, CSR-8126 & CSR-8127

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, this *ex parte* notice is filed on behalf of the Alliance for Community Media ("ACM"). On May 5, 2009, James Horwood, Tillman L. Lay, and the undersigned, all with Spiegel & McDiarmid LLP, Washington, D.C.; and counsel for ACM, met with Rick Chessen, Chief of Staff to Acting Chairman Michael J. Copps to discuss the above-referenced petition and the matters described in the attached handout.

A copy of this letter and the handout presented during the meeting are being filed via ECFS with your office. Please do not hesitate to contact me if you have any questions.

Sincerely,

Gloria Tristani

Attachment

cc: Rick Chessen

#### ALLIANCE FOR COMMUNITY MEDIA

### FCC Docket MB 09-13 (CRS-8126 et al.)

#### I. AT&T's U-Verse Multichannel Video Service is a "Cable Service."

- A. AT&T's U-verse video programming is a proprietary package of video programming (*i.e.*, of AT&T's own choosing) that AT&T transmits to subscribers over its own landline system of closed transmission paths that crosses local ROW. AT&T is therefore delivering a "cable service" over a "cable system."
- B. AT&T admits it is an MVPD and thus that it delivers "video programming."
- C. AT&T admits that it chooses the contents of its video programming package. It therefore admits that it is engaging in "one-way transmission" of video programming within the meaning of § 602(6)(A). NCTA v. FCC, 33 F.3d 66, 71 (D.C. Cir. 1994); Video Dialtone Reconsideration Order, 7 FCC Rcd 5069, 5071 (1992); Cable Modem Ruling, 17 FCC Rcd 4798, 4834 (2002).
- D. All of the subscriber interaction involved in AT&T's multichannel video programming service fits comfortably within "subscriber interaction . . . which is required for the selection or use of such video programming" within the meaning of § 602(6)(B). See SNET, 515 F.Supp. 2d 269, 279-80 (D. Conn. 2007); H.R. Confer. Rep. No. 458, 104<sup>th</sup> Cong., 2d Sess. at 169 (1996).
- E. The "cable service" definition is transmission protocol agnostic. It also draws no distinction between whether the system delivers one channel at a time as the subscriber selects it (VOD), or delivers all channels on a tier at once. *See SNET*, *supra*.
- F. Since AT&T's multichannel video programming service is not delivered by a "radio-based system," through video common carriage, or through an OVS, § 651 dictates that AT&T must be providing the service as a "cable operator" under Title VI.

## II. Finding That AT&T Is Providing a "Cable Service" Does Not Pre-Judge Any Larger Issues About Treatment of Internet Services.

- A. IP is a transmission protocol, not the Internet. AT&T's video programming service is *not* Internet-based; it just happens to be delivered in Internet protocol. But it remains a proprietary, "closed" package of video programming that is *not* delivered over the Internet. It is therefore readily distinguishable from online video services such as Hulu.
- B. As a closed, proprietary package of video programming not delivered over the Internet, AT&T's U-Verse video service is not Internet access and thus bears no resemblance to the service at issue in the *Cable Modem Ruling*.

C. As a Title VI "cable service," AT&T's U-verse video service is subject to preemptively light regulation at all levels. See §§ 624(a) & (f)(1).

# III. Even if AT&T Were Not Providing a "Cable Service' (but it clearly is), the FCC May Grant All of the Relief Requested in ACM's Petition Under Title I.

A. In its January 12, 2006, ex parte letter (at p. 9) in WC Docket No. 04-36, AT&T conceded as much:

[I]f additional safeguards are necessary, the Commission's Title I authority over video services is more than sufficient to address them; AT&T and others have made clear that they are fully prepared to pay franchise fee equivalents, to support PEG programming, and to otherwise work with local governments and the Commission to protect the public interest.

(Emphasis added.)

B. We believe, however, that the applicability of Title VI to AT&T's U-verse video offering is clear, and that Title VI presents a much cleaner, more competitively-neutral, and preferable, way to resolve the issue.

#### IV. The Commission Can and Should Act Promptly on the PEG Petitions.

- A. AT&T is forging ahead as if it were not subject to Title VI, to the detriment of PEG centers and their viewers.
- B. AT&T once believed prompt FCC action was required. In the same January 12, 2006, *ex parte* letter (at 3-5), AT&T argued that "Commission action" on the U-verse "cable service" issue was "overdue," and that it was "imperative" that the Commission "do so quickly."